



WILLS AND ESTATE PLANNING

MATERIALS

ON

WILLS AND SUCCESSION TO PROPERTY

2002 - 2003

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Professor R.E. Scane

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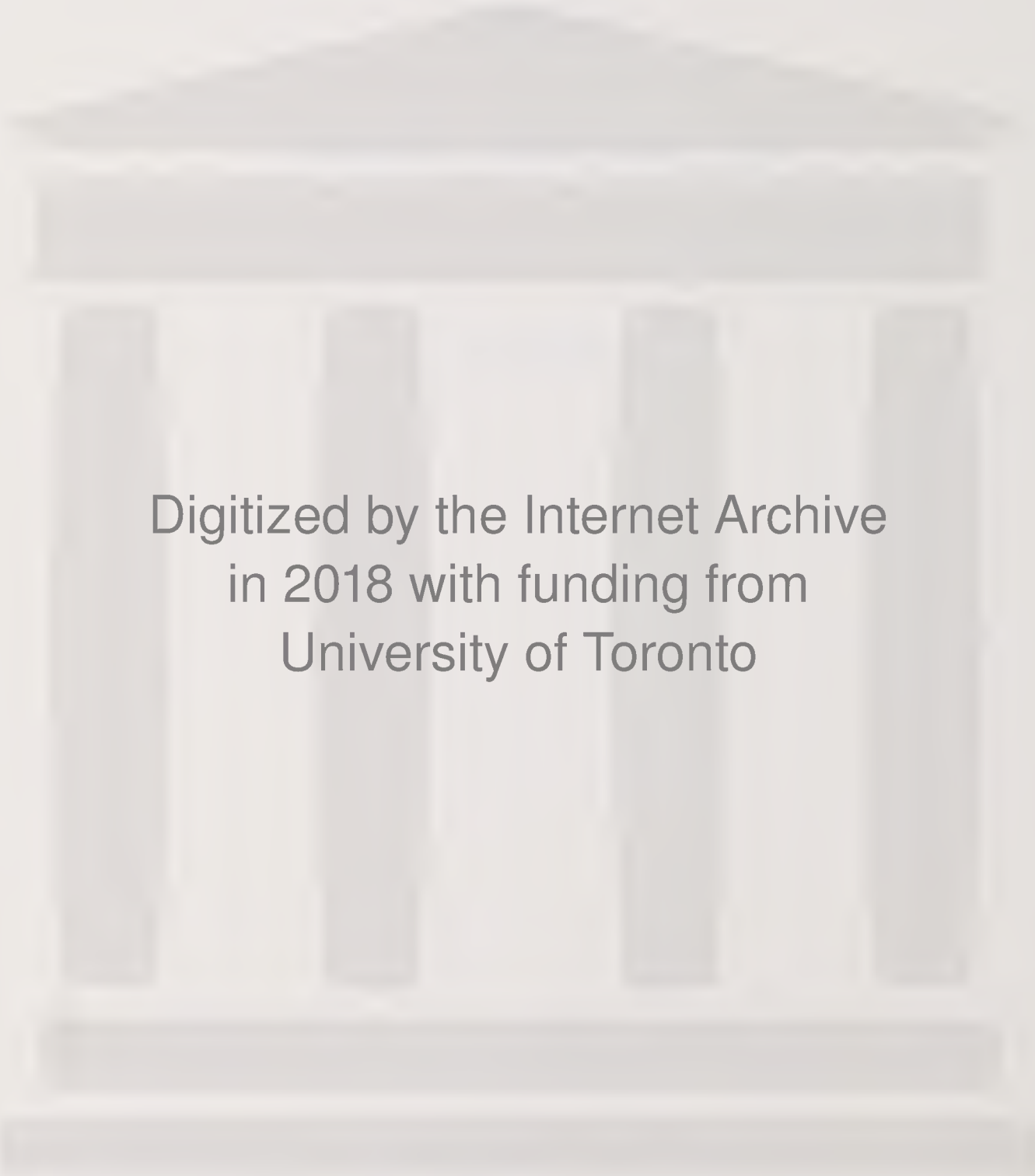
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SECTION E: WILLS AND ESTATES CHECKLIST

Checklist and Notes prepared by the Professional
Standards Committee, Law Society of Upper Canada,
June, 1995

E.1.1

PART 1 - INTRODUCTION

The law of intestate succession in Ontario is governed by statute. For deaths prior to March 31, 1978, the principal statute was The Devolution of Estates Act, R.S.O. 1970, c.129 (hereinafter called the D.E.A.) For deaths occurring on and after March 31, 1978, the principal statute is The Succession Law Reform Act, R.S.O. 1990, c. S.26, (hereinafter called the S.L.R.A.), Part II.

At common law, where a person died intestate, the real property descended to that person's heir. The distribution of personal property on intestacy grew in a more or less haphazard fashion, and was first standardized in England by the Statute of Distributions, 1670, which forms a rough basis for s.31 of our D.E.A., and for Part II of the S.L.R.A. In Ontario, various statutory amendments gradually changed the schemes of distribution, until in 1886, the first D.E.A. was passed. The scheme of distribution on intestacy then set up is, in basic form, still with us today, subject to some important amendments affecting the position of the spouse of the intestate.

Under the D.E.A. and the S.L.R.A. the distinction between real and personal property for purposes of distribution is almost abolished. The qualifying adjective is used because dower and curtesy must still be considered in working out the distribution of an intestate's estate, where the deceased died before March 31, 1978.

Devolution Upon the Personal Representative

A personal representative is an executor* or an administrator*. The term "personal representative" arises from the circumstance that, in the early stages of the evolution of the offices, the executor or administrator represented the deceased only in the administration of the personal property of the deceased, which was transmitted by operation of law into the hands of the personal representative or representatives, for this purpose. Real property passed directly to the heir-at-law, not passing through the personal representatives' hands, unless, after wills of real property were permitted, it was given by the will ("devised") to some person other than the heir. If the deceased dies testate (i.e. leaving a will) and in that will names a person or persons, expressly or by implication, to act as executor or executors, and if the persons so named do not renounce, and are able to act, they will be the executors of the will. They may, and usually do, obtain "letters probate"* of the will, i.e., they obtain a court declaration that the will under which they are acting is in fact the last valid will and testament of the deceased. However, their powers, as executors, do not derive from the letters probate, but from the will itself. The function of the letters probate is to prove to the world the executors' title to the deceased's property.

If the deceased dies totally intestate, the probate court, which, in Ontario, is the Ontario Court (General Division), which has jurisdiction over grants of probate and administration, will appoint an administrator* of the deceased's estate, usually from among the spouse, children or next-of-kin, in an established order of priority. The administrator, unlike the executor, derives title to and authority over the deceased's property only from the "letters of administration"* granted by the court.

* For new Ontario terminology, see p. B.1.3.

Total intestacy will arise either,

1. Where the deceased has not made a will, or
2. Where the deceased has made a purported will of which probate has been refused because it failed to comply with the formal requirements of the applicable statute, or because the deceased lacked testamentary capacity at the time the will was executed, or because it has, in its entirety, been procured by fraud, or undue influence.

Sometimes, the deceased will die partially intestate, that is, he or she has made a will, but the will leaves some of the deceased's property undisposed of. This situation arises either because the will has not been drawn in such terms as to catch all of the assets, or because some of the intended dispositions fail at law for some reason. If the will in question names executors who are able and willing to act, they will administer the property as to which the deceased died partially intestate, just as they administer the property validly disposed of by the terms of the will.

Sometimes, the deceased leaves a will, but no executors. The deceased may have failed to name executors, or the executors named may have predeceased the deceased, or refused to act and renounced probate. In this case, the Court appoints an administrator with the will annexed.^{*} The title derives from the form of the grant, called "letters of administration with the will annexed".^{*} Here, the administrator carries out the duties of the personal representative in accordance with the terms of the will, just as an executor would do, but, like an ordinary administrator, authority is derived from the letters of administration.

The key section to the law of administration of the property of deceased persons, both before and after March 31, 1978, is s.2 of the D.E.A., now s.2 of The Estates Administration Act, R.S.O. 1990, c.E.22.

2.-(1) All real and personal property that is vested in a person without a right in any other person to take by survivorship, on the person's death, whether testate or intestate and despite any testamentary disposition, devolves to and becomes vested in his or her personal representative from time to time as trustee for the persons by law beneficially entitled thereto, and, subject to the payment of the person's debts and so far as such property is not disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of.

(2) This section applies to property over which a person executes by will a general power of appointment as if it were property vested in the person.

(3) This section does not apply to estates tail or to the personal property, except chattels real, of a person who, at the time of death, is domiciled out of Ontario.
R.S.O. 1980. c. 143, s. 2.

The effect of the section is that title to all property, real and personal, of a deceased person, whether he or she dies testate or intestate, devolves upon the personal representative, who holds the property in trust to pay the debts and funeral expenses of the deceased, and then to distribute it among the persons beneficially entitled. If the deceased died testate, the

^{*} For new Ontario terminology, see p. B.1.3.

persons beneficially entitled are those named in the will. If he or she died intestate, they are the persons entitled to take under the provisions of the D.E.A., or the Succession Law Reform Act, as the case may be. The real property of the deceased is distributed as if it were personal property.

In Ontario, the Ontario Law Reform Commission, in 1991, issued its "Report on Administration of Estates of Deceased Persons". In this Report and in the various study papers from which the Commissioners worked, a number of differences between the office of personal representative, whether executor or administrator, and the modern trustee were explored. These arose because of the differing histories of the two offices (that of the personal representative is the older), which sometimes give rise to differences in result in particular situations which can be traps for the unwary. (A very terse history of the personal representative's office, and of the key differences, may be found in the Report, at pp. 5 to 15).

The Report recommends new legislation to assimilate the office and duties of a personal representative to those of a trustee. In partial implementation of these changes, amendments to the rules governing Estate Proceedings (Rules 74 and 75) in the Ontario Rules of Civil Procedure were enacted by O. Reg. 484/94, and became effective January 1, 1995. Among other things, these changes brought about a major change in the nomenclature used in Ontario, from that which has traditionally been employed in the common law world. In the materials which follow, the traditional language continues to be employed, as this is the terminology still in use in most common law jurisdictions, and which will be found in most of these materials.

The changes affecting terms used in these materials are:

"Certificate of Appointment of Estate Trustee" means letters probate, letters of administration or letters of administration with will annexed;

"Estate Trustee" means an executor, administrator or an administrator with will annexed;

"Estate Trustee With a Will" means an executor or an administrator with will annexed:

"Estate Trustee Without a Will" means an administrator;

SECTION B: INTESTATE SUCCESSION IN ONTARIO

PART 2: DEATHS BEFORE MARCH 31, 1978

PART 2 - DISTRIBUTION OF PROPERTY ON INTESTACY: DEATHS BEFORE MARCH 31, 1978

Potential takers were divided into three groups:

- (i) Spouse
- (ii) Lineal descendants
- (iii) Lineal ascendants and collaterals

With the exception of the spouse, the right to participate in a distribution under the D.E.A. was limited to persons related to the deceased by consanguinity (i.e. by blood). Persons related only by affinity (i.e., by marriage) did NOT share. When dealing with consanguinity, remember that relatives of the half-blood share equally with relatives of the whole blood. For example, a half-brother of the deceased intestate had an equal claim on his or her estate to that of a full brother. Re Wagner (1903), 6 D.L.R. 680.

A THE SPOUSE

(i) Wife: Preferential Share

Since 1897, the wife of the intestate has been entitled to a first cut from the pie before anyone else was let in. Originally, this preferential share was \$1,000. In 1941, it was increased to \$5,000; effective January 1, 1961, it was increased to \$20,000. As of July 1, 1973, it was increased to \$50,000. See D.E.A. s.11.

11.--(1) The real and personal property of every man dying intestate and leaving a widow, whether or not he leaves issue, where the net value of such real and personal property does not exceed \$50,000, belongs to his widow absolutely and exclusively.

(2) Where the net value exceeds \$50,000, the widow is entitled to \$50,000 part thereof, absolutely and exclusively, and has a charge thereon for such sum with interest thereon from the date of the death of the intestate at 4 per cent per annum until payment.

(3) The provision for the widow made by this section is in addition and without prejudice to her interest and share in the residue of the real and personal property of the intestate remaining after payment of such sum of \$50,000 and interest in the same way as if such residue had been the whole of the intestate's real and personal property and this section had not been enacted. R.S.O. 1960, c.106, s.11(1-3); 1960-61, c. 22, s. 1.

(4) Where the estate consists in whole or in part of real property, this section applies only if the widow elects under section 8 to take an interest in her husband's undisposed-of real property in lieu of dower.

(5) In this section, "net value" means the value of the real and personal property after payment of the charges thereon and the debts, funeral expenses and expenses of administration, including succession duty. R.S.O. 1960, c.106, s.11 (4, 5).

The preferential share applied only in the case of a total intestacy. (Re Harrison (1901), 2 D.L.R. 217; Re Twigg, [1892] 1 Ch. 579.) In such a case, if the net value (as defined by s.11(5)) of the deceased husband's estate did not exceed \$50,000, the widow took all. Where the net value exceeded \$50,000, the widow took the first \$50,000 absolutely, together with interest at 4% until payment. In addition, she was entitled to her regular distributive share in the residue (i.e., that remaining after payment of the preferential share and interest), as hereinafter described, and that distributive share was calculated as if the residue were the entire estate and the preferential share did not exist.

(ii) Husband: Preferential Share

Until 1960, the husband of a woman who died intestate had no preferential share at all, only his regular distributive share. In 1960 he was given a preferential share of \$5,000, and, effective January 1, 1961, this was increased to \$20,000. Effective July 1, 1973, this was further increased to \$50 000. See s.12 of the D.E.A.

12.-(1) The real and personal property of every woman dying intestate and leaving a widower whether or not she leaves issue shall, where the net value of such real and personal property does not exceed \$50,000, belong to her widower absolutely and exclusively.

(2) Where the net value exceeds \$50,000, the widower is entitled to \$50,000 part thereof, absolutely and exclusively, and has a charge thereon for such sum-with interest thereon from the date of the death of the intestate at 4 per cent per annum until payment.

(3) The provision for the widower made by this section is in addition and without prejudice to his interest and share in the residue of the real and personal property of the intestate remaining after payment of such sum of \$50,000 and interest in the same way as if such residue had been the whole of the intestate's real and personal property and this section had not been enacted. R.S.O. 1960., c.106, s.12(1-3); 1960-61, c.22, s. 2.

(4) This section applies only where the husband has not elected under section 30 to take such interest in the real and personal property of his wife as he would have taken if this Act had not been passed.

(5) In this section, "net value" means the value of the real and personal property after payment of the charges thereon and the debts, funeral expenses, and expenses of administration, including succession duty. R.S.O. 1960, c.106, s.12 (4, 5).

(iii) No Preferential Share Where Deceased Survived by Infant Child of Former Marriage

To give effect to a belief that the preferential share to a spouse discriminated against children of a former marriage, s.12a was added to the D.E.A. in 1966. This became s.13 in the 1970 revision.

13. Sections 11 and 12 do not apply to the surviving spouse of a person who dies intestate and is survived by one or more infant children by a former marriage. 1966, c. 45, s. 1 (1).

(iv) Distributive Share of the Wife

The share of a wife of a man who died intestate was governed by s.31 of the D.E.A., which was the general section setting out the scheme of distribution on intestacy.

31. Except as otherwise provided in this Act, the personal property of a person dying intestate shall be distributed as follows: one-third to the wife of the intestate and all the residue by equal portions among the children of the intestate and such persons as legally represent the children in case any of them died in his lifetime, and, if there are no children or any legal representatives of them, then two-thirds of the personal property shall be allotted to the wife and the residue thereof shall be distributed equally to every of the next of kindred of the intestate who are of equal degree and those who legally represent them, and for the purpose of this section the father and the mother and the brothers and the sisters of the intestate shall be deemed of equal degree; but there shall be no representations admitted among collaterals after brothers' and sisters' children, and, if there is no wife, then all such personal property shall be distributed equally among the children, and, if there is no child, then to the next of kindred in equal degree of or unto the intestate and their legal representatives and in no other manner; but, if there is only one child or there are legal representatives of only one child, the personal property of a person dying intestate shall be distributed as follows: one-half to the wife of the intestate and the other half to the child or the legal representatives of the child.
R.S.O. 1960, c. 106, s. 30; 1961-62, c. 34, s. 2.

Summarizing the wife's position, from a combination of s.11 and s.31 we have the following possibilities.

- (i) Deceased survived by wife alone - no children of husband or "legal representatives" of deceased children.

Wife took: (i) Preferential share and interest (s.11)
(ii) Two-thirds of the residue

The remaining one-third of the residue went to the deceased's next-of-kin, as subsequently described.

- (ii) Deceased survived by wife and one child of husband, or the "legal representatives" of one deceased child.

Wife took: (i) Preferential share and interest
(ii) One-half of the residue

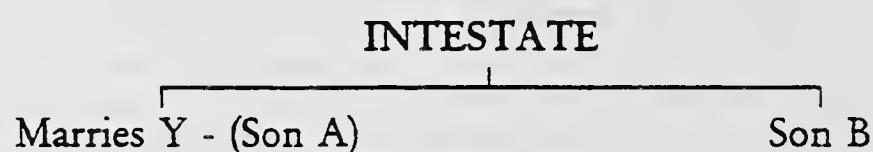
The remaining one-half of the residue went to the deceased's child or to the "legal representatives" of the deceased child.

- (iii) Deceased survived by wife and more than one child of husband, or "legal representatives" of deceased children.

Wife took: (i) Preferential share and interest
(ii) One-third of the residue

The remaining two-thirds of the residue was divided among the children, or "legal representatives" of the children, in equal shares per stirpes.

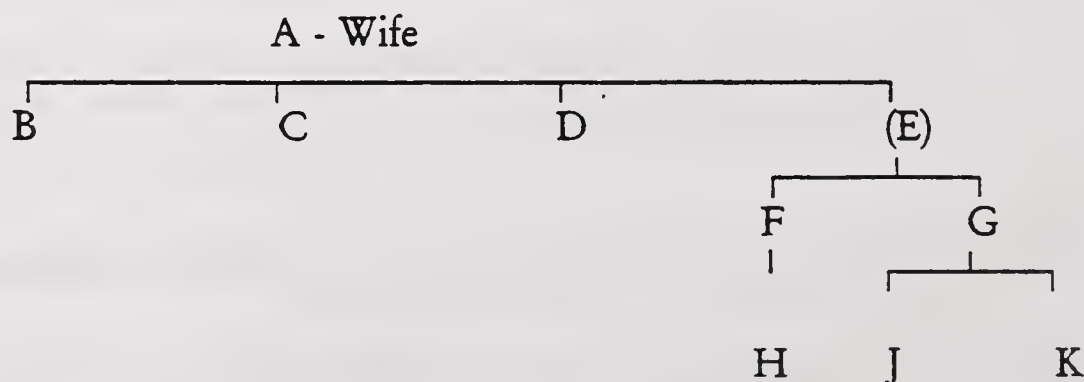
"Legal Representative": For the purposes of s.31 of the D.E.A., the "legal representatives" of a deceased child of the intestate are that child's lineal issue. "Legal representatives" are not equivalent to "personal representatives", and hence do not include executors and administrators. Also, the term does not include the spouse of a deceased child of the intestate.



The intestate during his lifetime had two sons, A and B. A predeceased Intestate, leaving a widow Y. but no issue, surviving the Intestate. The Intestate was not survived by his own spouse. Neither A's widow, nor his personal representatives were entitled to a share in Intestate's estate. B took all.

"Per Stirpes": A stirpital distribution (or a distribution per stirpes) is one where each family or stock takes an equal share with every other family or stock entitled to participate in the distribution, and such share is then subdivided equally between the members of such family or stock, subject to the proviso that no member of the family or stock may take if he or she has a lineal ancestor alive and capable of taking.

Suppose A died intestate, survived by his wife; three children, B, C and D; two grandchildren, F and G, who are children of a child E, who predeceased A; and three great-grandchildren, H, who is a child of F, and J and K, who are children of G.



Distribution under above example:

- (i) Wife took: (i) preferential share and interest
(ii) one-third of residue

The other two-thirds of residue is divided equally *per stirpes* between the

remaining children and their legal representatives. The stocks, or stirpes, are composed of the "families" B, C, D and E. Since the essence of stirpital distribution is equality between stocks, each of these four stocks shares equally.

Therefore, B, C and D each took $\frac{1}{4}$ of $\frac{2}{3}$ of the residue after paying the widow's preferential share. It will not matter whether any of these had children or more remote issue living at the death of the intestate. These cannot share under stirpital distribution as their respective ancestors, B, C, and D, are alive and capable of taking.

E was not alive to take his $\frac{1}{4}$ share, but the intestate was survived by "legal representatives" of E, so E's legal representatives "moved up" to represent him. F and G were equally related to the intestate, so they moved up and took the share E would have taken if living, equally between them, i.e., F and G each took $\frac{1}{2}$ of $\frac{1}{4}$ of $\frac{2}{3}$ of the residue left after payment of the widow's preferential share.

Suppose E had not had any lineal issue who survived A. In such case, his "stock" would have been extinct at the time of distribution, A's death, and the only persons to share would have been B, C and D, who would each have taken $\frac{1}{3}$ of $\frac{2}{3}$ of the residue after paying A's widow's preferential share.

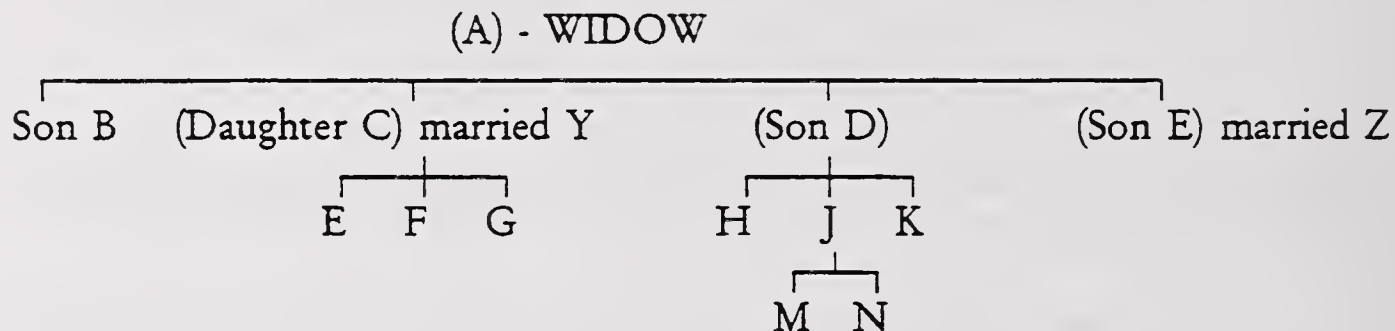
Or, suppose G had also predeceased A. In our previous example, J and K could not share because they had a lineal ancestor (G) living and capable of taking. Now, they can move up and, together, take G's place in the ladder, dividing between themselves such share as G would have taken if living, i.e., each taking $\frac{1}{2}$ of $\frac{1}{2}$ of $\frac{1}{4}$ of $\frac{2}{3}$ of the residue left after paying A's widow's preferential share. In effect, the stirpes, or stock, of E has subdivided. The same principles of stirpital distribution continue to apply within each subdivision.

If both F and G had predeceased A, H would move up and take all of his parent's (F's) share. In the result, H would get twice as much as either J or K.

Note that lineal descendants of the intestate always took per stirpes. Thus, if no children of an intestate survived him, only grandchildren, the grandchildren took per stirpes.

This is not patent from s.31 itself, as you might think that where you were dealing with grandchildren or more remote issue only, and not with children of the intestate, the grandchildren or more remote issue came within the term "next-of-kindred", which, if so, would lead to a different distribution. However, it has been held that "next-of-kindred" does not include issue of children of the intestate. The term "children" in s.31 means "children living at the death of the intestate, either themselves, or in their descendants". Re Natt (1888), 37 Ch.D. 517.

Try the following example. The intestate is A. Those of A's issue who are indicated by brackets have predeceased him. A's widow survives.



Y, widower of C, is living

Z, widow of E, is living

The net value of A's estate is \$140,000. Calculate the distribution.

(v) Distributive Share of the Husband

The distributive share of the husband of a woman who dies intestate was governed by s.30 of the D.E.A.

30.-(1) Subject to section 12, the real and personal property, whether separate or otherwise, of a married woman in respect of which she dies intestate shall be distributed as follows: one-third to her husband if she leaves issue, and one-half if she leaves no issue, and, subject thereto, devolves as if her husband had predeceased her.

(2) A husband who, if this Act had not been passed, would be entitled to an interest as tenant by the curtesy in real property of his wife, may, by deed or instrument in writing executed and attested by at least one witness and delivered to the personal representative, if any, or, if there is none, deposited in the office of the Registrar of the Supreme Court at Toronto within six months after his wife's death, elect to take such interest in the real and personal property of his wife as he would have taken if this Act had not been passed, in which case the husband's interest therein shall be ascertained in all respects as if this Act had not been passed, and he is entitled to no further interest thereunder. R.S.O.1960, c.106, s.29, *amended*.

Summarizing the husband's position, from a combination of s.12 and s.30, we have the following possibilities.

1. Deceased survived by husband alone - no children of wife or legal representatives of deceased children.

Husband took: (i) preferential share and interest (s.12)
 (ii) one-half of residue

The remaining half of residue went to the wife's next-of-kin.

2. Deceased survived by husband and one or more children of wife, or legal representatives of deceased children.

Husband took: (i) preferential share and interest (s.12)
 (ii) one-third of residue

The remaining half of residue went to the children and/or their legal representatives, in equal shares per stirpes.

(vi) The Effect of Dower on the Share of the Wife

See Appendix to this part for a short note on dower.

Where the husband died intestate owning real property out of which the wife would be entitled to dower, s.8 of the D.E.A. provided that she would take her dower unless she elected to take her distributive share in the real property.

8.-(1) Nothing in this Act takes away a widow's right to dower, but a widow may by deed or instrument in writing, attested by at least one witness, elect to take her interest under this Act in her husband's undisposed-of real property in lieu of all claim to dower in respect of the real property of which her husband was at any time seised or to which at the time of his death he was beneficially entitled, and, unless she so elects, she is not entitled to share in the undisposed-of real property.

(2) The personal representative of the deceased may, by notice in writing, require the widow to make her election, and, if she fails to execute and deliver a deed or instrument of election to him within six months after the service of the notice, she shall be deemed to have elected to take her dower.

(3) Where the widow is an infant or a mentally incompetent person, the right of election may be exercised on her behalf by the Official Guardian with the approval of a judge or by some person authorized by a judge to exercise it, and the Official Guardian or the person so authorized may, for and in the name of the widow, give all notices and do all acts necessary or incidental to the exercise of such right.

(4) Where the widow is a patient in a psychiatric facility under *The Mental Health Act* and the Public Trustee is committee of her estate, he is entitled to exercise on her behalf the power of election conferred by this section. R.S.O. 1960, c.106, s.8.

In essence, where a widow had a right to dower, she was prima facie entitled to her dower in the real property, plus her distributive share of the personal property, pursuant to s.31 of the D.E.A., but without the \$50,000 preferential share (see s.11(4)). She was not entitled to any distributive share in the real property, which was distributed as if the wife had predeceased the husband, subject, of course, to the wife's dower interest in it.

If the widow who was dowable out of her intestate husband's lands wished to take her preferential share under s.11, plus her distributive share of the husband's real property, as well as her distributive share of the personal property, she had to elect to do so in accordance with s.8 of the D.E.A. There was no time limit placed on her election, but the husband's personal representative could force her to her election, under s.8(2).

If the widow did not so elect, she was presumed to take her dower, and she could elect only in her own lifetime. Her personal representatives could not elect for her. In Re Oliphant (1921) 51 D.L.R. 84; 51 D.L.R. 284. Also she had to be eligible to make an election. Re Schop, [1948] O.W.N. 33

The failure to remember the presumption in favour of dower could have serious consequences to the surviving wife or to her estate. See Re Carberry (1963), 40 D.L.R. (2d) 40; Whitmarsh v. Whitmarsh, [1972] 1 O.R. 537, 23 D.L.R. (3d) 520; Re Case, [1973] 3 O.R. 50; 35 D.L.R. (3rd) 653.

The wife's right to dower rather than to a distributive share of the real property could be valuable if the husband's estate was heavily encumbered with debts. The dower interest was not subject to the husband's debts, unless they were charged on the land and she had barred her dower for such purpose. Ordinarily, however, in view of the large preferential share and the value of her distributive share of the real property, she would be far better off electing against taking dower.

(vii) The Effect of Curtesy on the Share of the Husband

See Appendix to this part for a short note on curtesy.

By s.30 of the D.E.A., the husband's right to curtesy was preserved. He could elect to take such interest as he would have taken in the real and personal property of his wife if the D.E.A. had not been passed.

If he made this election (and he was entitled to do so only if he qualified for curtesy) he was entitled to receive,

- (i) a life estate in the real property of his wife.
- (ii) all the personal property of his wife, absolutely.

If the surviving husband could and did make the election under s.30(2) of the D.E.A., he did not receive a preferential share. See s.12(4). On his death, the real property of his wife was distributed according to the intestacy rules, as if the husband had predeceased her.

If the husband failed to elect, he was considered to take his distributive share under the D.E.A. This was the opposite of the situation with dower. Also, the election had to be made within six months of the wife's death.

The conclusion that the husband took all of the personalty if he elected curtesy is not free from doubt. This conclusion, unsupported by direct judicial authority in Ontario, is a peculiar example of the "oral tradition", passing down through successive generations of law teachers. The conclusion has been accepted as probably accurate by Ontario Law Reform Commission researchers (see O.L.R.C.: Study Prepared by the Family Law Project, Volume 1, p. 150 et. seq.), but has been attacked by J.W. Morden in a comment in (1966), 44 Can. Bar Rev. 346. Mr. Morden, (as he then was), after a detailed analysis of the Ontario legislative history, concluded that the husband would take all of the personalty only if no children survived the wife.

B THE LINEAL DESCENDANTS

The position of the lineal descendants of the intestate (i.e., of his children and more remote issue) was covered in dealing with the distributive share of the spouses. Note that if a person died intestate, then, subject to the rights of the surviving spouse, if any, his or her issue took all, in equal shares per stirpes. In other words, as long as there were lineal descendants of the intestate who survived him or her, neither the lineal ascendants nor the collaterals of the intestate could take.

"Advancements" to Children:

If a parent "advances" a child during the parent's lifetime, i.e. transfers property to that child on the understanding that the subject matter of this transfer is an "advance" on the property the child would expect to inherit on the parent's intestacy, then, in Ontario, if the advance is so expressed in writing by the parent, or acknowledged in writing by the child, the child must bring the amount of the advance "into hotchpot". This means that, in calculating the distribution of the intestate's estate, and for this purpose only, the estate to be distributed is treated as if it had been augmented by the repayment of the amount advanced. The distributive shares are worked out accordingly, and the amount of the advance is debited to the share of the child who has been advanced. If the amount of the actual advancement is as great or greater than the child's share as so calculated, the child gets nothing on the distribution. However, the child does not have to repay any excess. If the amount of the actual advance is less than the child's share as so calculated, then the actual distribution to that child is reduced.

The purpose of "hotchpot" provisions is to promote equality among the children of the intestate, and ensure that children who have received an advance on their expectations do not share on an equal footing with those children who were not so favoured, in the distribution of the parent's estate.

29.-(1) If a child of an intestate has been advanced by the intestate by settlement or portion of real or personal property or both, and the same has been so expressed by the intestate in writing or so acknowledged in writing by the child, the value thereof shall be reckoned, for the purposes of this section only, as part of the real and personal property of the intestate to be distributed under this Act, and if the advancement is equal to or greater than the amount of the share

that the child would be entitled to receive of the real and personal property of the intestate, as so reckoned, then the child and his descendants shall be excluded from any share in the real and personal property of the intestate.

(2) If the advancement is less than the share, the child and his descendants are entitled to so much only of the real and personal property as is sufficient to make all the shares of the children in the real and personal property and advancement to be equal, as nearly as can be estimated.

(3) The value of any real or personal property so advanced shall be deemed to be that, if any, which has been acknowledged by the child by an instrument in writing, otherwise the value shall be estimated according to the value of the property when given.

(4) The maintaining or educating of, or the giving of money to, a child without a view to a portion or settlement in life shall not be deemed an advancement within the meaning of this Act. R.S.O. 1960, c. 106. s. 28.

"Hotchpot" clauses are also sometimes inserted in wills, for a similar purpose.

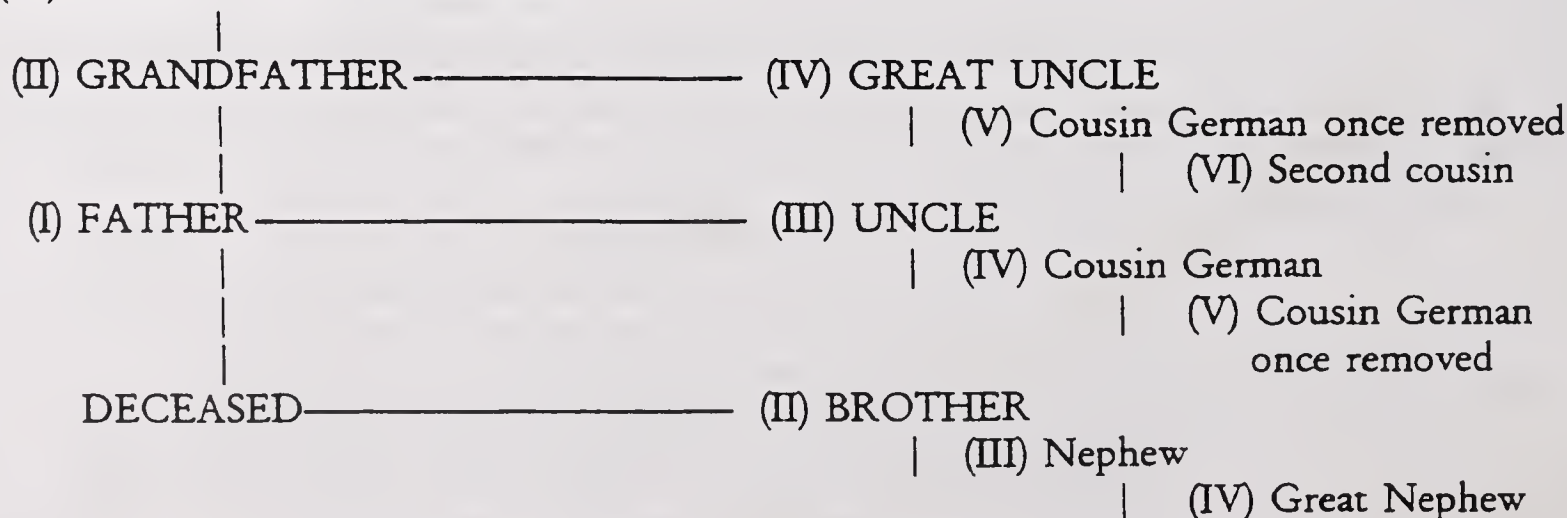
For a discussion of s.29 of the D.E.A. and its successor, for deaths on and after March 31, 1978, the Estates Administration Act, R.S.O. 1990, c.E.22, s.25, see K.T. Grozinger, "The Ontario Law of Advancement on an Intestacy", (1993), 12 Est. & Tr.T. 396.

C LINEAL ASCENDANTS AND COLLATERALS

This group was classed by the D.E.A. as "next-of-kin" as distinguished from "spouses" and "children". The share of the estate going to next-of-kin was given to the person or class of persons in the closest degree of relationship to the intestate, and if there was more than one person in such class, the next-of-kin shared equally.

To determine the degree of relationship of a lineal ascendant, you count up each ascendant as one degree. To establish the degree of relationship to a collateral, you count up to the first common ancestor, and then down again to the collateral concerned.

(III) GREAT GRANDFATHER



The degree of relationship to the deceased is in each case shown by the roman numeral in front of the relative's name. For example, to determine the degree of relationship of the uncle to the deceased, count up to the common ancestor of the deceased and the uncle, i.e., to the deceased's grandfather. This gives a count of 2. Then, count down from the grandfather to his son, (the uncle). This gives an additional count of 1, for a total of 3. Therefore, your blood uncle is in the third degree of consanguinity.

The uncle's son (the deceased's Cousin German, or first cousin) is, by a similar count, in the fourth degree of relationship to the deceased.

On the above chart, suppose that the deceased's father, grand-father, great-grandfather and brother had all predeceased him. The closest degree of next-of-kin would thus be the third. The nephew and uncle would share the deceased's estate equally. All others, of more remote degree, would be excluded.

What would be the distribution, on the assumption in the preceding paragraph, if the deceased was also survived by his wife?

There are some qualifications to the above rule imposed by the D.E.A.

(a) By s.31, for the purposes of that section, the father, mother, brothers and sisters of the intestate were deemed to be of equal degree.

Therefore, if A died intestate, survived only by his mother, a brother and two sisters, all would share equally. Were it not for the relevant portion of the statute, the mother would take all.

b) Representation

We have seen, when dealing with lineal descendants, that issue could move up to represent their deceased parent in sharing in an intestate distribution. This was true to only a limited extent when dealing with collaterals. The D.E.A., s.31, provided that there shall be no representation among collaterals after brothers' and sisters' children. To this extent only was representation permitted.

For example, A died intestate, leaving him surviving his father, a brother, a sister, and two nieces, children of a deceased brother. The two nieces were permitted to come in and take the share their father would have taken if living. Thus, the intestate's father took 1/4, the brother and sister each took 1/4, and the two nieces took 1/8 each. (see Walker v. Allen (1897), 24 O.A.R. 336)

However, if one of the nieces had in turn predeceased the intestate, leaving a child (a great-niece) surviving, that great-niece would not be permitted to move up and take. The surviving niece would have taken all her parents' share, i.e., 1/4. Contrast this with representation among lineal descendants, where there was no limit on how far down the ladder you might go to find a "legal representative".

However, this right of representation by children of deceased brothers and sisters of the intestate was subject to limitations imposed by judicial gloss on the statute. Surprisingly, the exact nature of the limitation in Ontario is still subject to some controversy. One view is that representation was permitted only when the children of deceased brothers or sisters of the intestate were competing with living brothers or sisters of the intestate. This view is espoused by Professor P.W. Hogg [(1973), 11 Osgoode Hall L.J. 479; reprinted, 1 Estates & Trusts Quarterly, 249]. The other view, taken by the authors of the study paper prepared for the Ontario Law Reform Commission, [see Study prepared by the Family Law Project, Vol. m, Pp. 449-450] is that representation by children of deceased brothers and sisters of the intestate is permitted only when those children are competing with living brothers or sisters or parents of the intestate. In any event, there is agreement that representation is not permitted when the children of brothers and sisters of the deceased are competing with other collaterals. The nephews and nieces took, if at all, in their own right. See Re Bailey, [1948] 2 D.L.R. 367; Re Hunter, [1954] O.R. 809; [1954] 4 D.L.R. 796.

In Hunter, the deceased died a bachelor and intestate, leaving him surviving as his closest next-of-kin, his nephew (the son of a deceased brother), his uncle (the brother of his mother), and an aunt (the sister of his father).

All of these survivors are of the third degree. The nephew argued that he should be allowed to represent his father (the deceased brother of the deceased), who, of course, would have been of the second degree. If this had been allowed, the nephew would have taken all.

The Court held that children of deceased brothers and sisters do not represent their parents in all cases. Here, where there were no living kin of the second degree, and it was necessary to go to the third degree to establish the next-of-kin, the nephew took in his own right, and not as representative of his father. Thus, nephew, aunt and uncle shared equally.

The difficulty arose because the words, "and for the purpose of this section the father and the mother and the brothers and the sisters of the intestate shall be deemed of equal degree;" were inserted, in 1910, into the middle of what is now s.31 of the D.E.A. (see pp 5-6 supra). The balance of s.31, however, is derived from the English Statute of Distributions of 1670.

The original case which limited the right of representation of children of deceased brothers and sisters was decided in 1751, based upon the Statute of 1670. [Lloyd v. Tench, 2 Ves. Sen. 213; 28 E.R. 138]. In that case, it was held that children of deceased brothers or sisters of an intestate could represent their deceased parent only if they were competing with a living brother or sister of the intestate. The authors of the "Family Law Study" assume that, since the 1910 insertion, this right of representation would be broadened to permit representation if there is a living parent of the deceased, even if there is no living brother or sister.

Professor Hogg's comment on this is that the 1910 insertion only deems parents to be "of equal degree" with brothers and sisters and does not equate them for all purposes. He also refers to a passage in the judgement of J.K. Mackay, J.A., in Re Hunter (*supra*) which states that "full effect can be given to these words [i.e., to the words "inserted" in 1910] by interpreting the statute to mean that parents shall not take to the exclusion of brothers and sisters".

Professor Hogg also calls in aid a passage in a comment by Professor G.D. Kennedy in (1948), 26 Can. Bar Rev. 1251, at 1254. Referring to the provision that there shall be no representation after brothers' and sisters' children, Professor Kennedy says, "Presumably this meant that there could be representation by nephews and nieces only where at least one brother or sister was still alive... The result of Re Bailey in Ontario must so indicate. If all brothers and sisters were dead there would be no one alive in that class to take, and we would move on to the next class."

The author of these notes is not convinced by Professor Hogg's arguments, but leans to the interpretation given by the authors of the Family Law Project study referred to above, even though those authors assume the point, and do not argue it, as Professor Hogg has done. Re Bailey and Re Hunter were both concerned with a contest between aunts and uncles, on the one hand, and nephews and nieces, on the other. In neither case was the court directing its mind to a competition between a parent of the deceased and nephews and nieces of the deceased. [If Professor Hogg is correct, the parent would take to the exclusion of the nephews and nieces]. The same comment can be made of the remarks of Professor Kennedy. In a competition between nephews and nieces and a parent of the deceased, as with competition with brothers and sisters of the deceased, the competition is not all among third degree, as it is in the uncle-nephew fight. On its face, it is first degree competing with third, but it is a first degree that the statute equates with one group of the second degree (brothers and sisters) for which representation is permitted. Some support for this view may be derived from a further passage in Re Hunter, subsequent to that previously quoted:

"The amendment made to [the D.E.A.] in 1910 appears to have provoked considerable difference in opinion among members of the legal profession. One school of thought is that its effect was to exclude uncles and aunts in all cases where the deceased left him surviving children of a deceased brother and sister, who, it is said, might take by representation of a brother or sister, placed in equal degree to a parent by the amendment. The other school of thought is that the amendment did not change the law at all where the deceased left him surviving no parent or brother or sister."

[my underlining: R.E.S.]

The "first school of thought" referred to is now exploded by Re Bailey and Re Hunter. The "other school of thought" is that in fact adopted in Re Hunter. As with the previously quoted passage from Re Hunter, the Court's remarks, insofar as they refer to parents, are obiter, but in this case, they appear to support the conclusions of the authors of the "Family Law Study". The "law" which this "other school of thought" considered to be unchanged would be the law derived from Lloyd v. Tench (supra), but with "parent" now glossed on to it.

The controversy discussed above makes it necessary to consider the effect of s.32 of the D.E.A.

32. If after the death of a father any of his children die intestate without wife or children in the lifetime of the mother every brother and sister and the representatives of them shall have an equal share with her, anything in section 31 to the contrary notwithstanding. R.S.O. 1960, c.106., s.31.

This section is derived from an English statute of 1685, which was passed to overcome the result (from the 1670 statute) that the surviving mother of the intestate (if his father was dead) took all of the intestate's personalty to the exclusion of his brothers and sisters. [If the father was also alive, he took all to the exclusion of both mother and brothers and sisters]. The worry apparently was that the intestate's mother might remarry and thus carry all the intestate's property to her new husband, and thence out to his family. This possibility was mitigated by allowing brothers and sisters and their representatives to share. Although s.32 does not say so in terms, the limitation, found in s.31, that representation would not be permitted after children of deceased brothers and sisters, was carried over to this section by judicial gloss.

Now, if the view taken by the authors of the "Family Law Study" and by the writer, on the question of whether children of deceased brothers and sisters of the intestate can take by representation when there is a surviving brother or sister or parent of the intestate is correct, s.32 was a dead letter. It would always give the same result as s.31. However, if Professor Hogg's view of this controversy is correct, there could have been an anomalous situation in which s.32 would not give the same result as s.31 would have given. Professor Hogg points out that this situation arises where an intestate was survived by his mother and a child or children of a deceased brother or sister, but not by a living brother or sister. An early case, in 1739, on what is now s.32 had held that, unlike the situation under s.31, representation by children of a deceased brother or sister would be permitted even though there was no living brother or sister of the intestate. Thus, the nephews and nieces could represent the deceased brother or sister, and share with the mother.

Examples

(i) Father

|

(Intestate)

-

(Brother)

|

Nephew

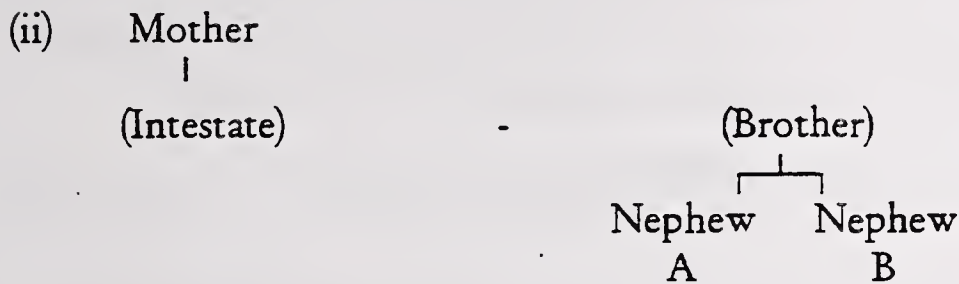
A

Nephew

B

S. 32 did not apply, but s.31 did. If Professor Hogg's approach is correct, the nephews could not have "moved up" by representation, because there was no living brother or sister of the intestate. Therefore, Father (1st degree) took all.

If the "Family Law Study" approach is correct, nephews could "move up" by representation, and compete with the father. The father would have taken $1/2$, and A and B would have shared the remaining half equally, on a stirpital distribution.



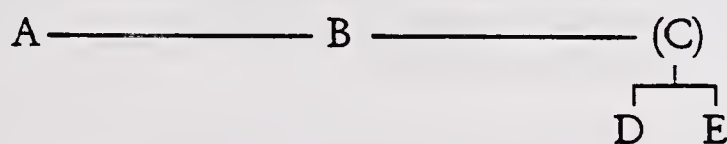
S. 32 did apply. Nephews A and B could have "moved up" and competed with the mother. If Professor Hogg's view of the operation of s.31 is correct, this could not have happened under s.31 and, in the absence of s.32, mother would have taken all.

On the other view of s.31, of course, s.31 would give the same result as does s.32.

The Hunter case also illustrates the point that collaterals and ascendants of equal degree shared per capita. In other words, when next-of-kin were taking in their own right, and not as representing a deceased parent, they shared equally with all other next-of-kin of equal degree, no matter how lopsided this might have made the distribution between branches of the family.

Compare the following situations:

1. A died intestate, survived by brother B, and two nephews, D and E, children of his deceased sister C.

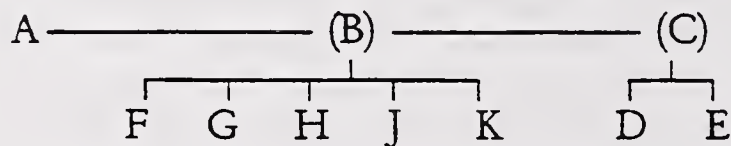


B is 2nd degree

D and E are 3rd degree

Here, D and E, who were competing with a brother of the deceased, were permitted to represent their deceased parent, and divide C's share equally among them. B took $1/2$, D and E took $1/4$ each. The distribution here was per stirpes.

2. Same situation, except that B has also predeceased A, leaving 5 children.



Here D, E, F, G, H, J and K are all of equal degree of relationship to A. Each of them was therefore competing only with other next-of-kin of equal degree to the intestate, and not with the father, mother, brother or sister of the intestate, who would be of higher degree. Therefore, they took in their own right, and not as representing their deceased parents. The distribution, accordingly, was per capita, and each took one-seventh.

What would be the result, in the immediately preceding example, if A's mother also survived him?

There was one probable exception to the above rule, where brothers and sisters competed with grandparents. Both are of the second degree, and, by the statute, should share equally. However, an old case, based on the original Statute of Distributions, held that notwithstanding the statute, the brothers and sisters took in priority to the grandparents. This was probably law in Ontario. Earl of Winchelsea v. Norcliff (1686), Freem. (Ch.) 95; 22 E.R. 1080.

D ILLEGITIMATE CHILDREN

See D.E.A. s.28

28.-(1) Subject to subsections 2 and 3, an illegitimate child or relative shall not share under any of the provisions of this Act. R.S.O. 1960, c.106, s.27; 1961-62, c. 34, s. 1 (1).

(2) Where the mother of an illegitimate child dies intestate as respects all or any of her real or personal property and does not leave any legitimate issue surviving her, the illegitimate child, or, if he is dead, his issue, is entitled to take any interest therein to which he or such issue would have been entitled if he had been born legitimate.

(3) Where an illegitimate child dies intestate in respect of all or any of his real or personal property, his mother, if surviving, is entitled to take any interest therein to which she would have been entitled if the child had been born legitimate and she had been the only surviving parent. 1961-62, c. 34, s. 1 (2).

Note the qualifications which the above section imposed.

A child illegitimately born could, in Ontario, be legitimated by the subsequent marriage of his parents. The governing legislation, prior to March 31, 1978, was The Legitimacy Act, R.S.O. 1970, c.242

